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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91222033
Party	Defendant THE FLORIDA BREWERY INC.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Abita Brewing Company, LLC	)	
	)	Opposition No.: 91/222033
Opposer	)	
v	)	Serial No. 86/416,478
	)	
The Florida Brewery, Inc.	)	
	)	Mark: GATOR
Applicant	)	

ANSWER TO NOTICE OF OPPOSITION

Applicant, The Florida Brewery, Inc. ("Applicant"), hereby answers Opposer's Notice of Opposition as follows:

1. The Applicant admits the factual allegations and legal conclusions set forth in Paragraph 1 in their entirety.

2. The Applicant is without knowledge or sufficient information with which to admit or deny the factual allegations set forth in Paragraph 2, and is also without knowledge or sufficient information with which to admit or deny whether Exhibit A is a true and current printout of Gator's registration.

3. The Applicant is without knowledge or sufficient information with which to admit or deny the factual and legal allegations set forth in Paragraphs 3 and 4, and is also without knowledge or sufficient information with which to admit or deny whether Exhibit B is a sample of Gator's trademark.

4. The Applicant is without knowledge or sufficient information with which to admit or deny the factual and legal allegations set forth in Paragraphs 5 and 6. The Applicant admits that Exhibit C appears to evidence various items bearing the Abita Gator Mark(s).

5. The Applicant contests and denies the factual and legal allegations set forth in Paragraphs 7, 8 and 9

6. The Applicant contests and denies the factual and legal allegations set forth in Paragraph 10.

7. The Applicant contests and denies the factual and legal allegations set forth in Paragraph 11.

8. The Applicant contests and denies the factual and legal allegations set forth in Paragraph 12.

9. The Applicant contests and denies the factual and legal allegations set forth in Paragraph 13.

10. The Applicant denies that the Opposer is entitled to the relief it seeks in its prayer.

AFFIRMATIVE DEFENSE

I. NO LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co*., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We focus our discussion on the mark and goods in Registration No. 86/416,478 because it is for a mark and covers goods which is likely to support a finding of no likelihood of confusion. See, e.g., *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We begin our analysis with *In re E.I. du Pont de Nemours & Co* "similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression" factor, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Fondee En.* 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC.*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal citation omitted). In comparing the marks we are mindful that where the marks would be used in connection with legally identical services, as they do here, the degree of similarity necessary to support a conclusion of likelihood of confusion declines. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010);

In this case, the Applicant's mark includes "[G]ROWLING GATOR LAGER THE BEER WITH A BITE/FAVORITE OF LOUNGE LIZARDS EVERYWHERE." The mark merely contains the term "GATOR" and has a distinctly different use in its mark of an alligator in comparison with the Opposer's mark which is generic or, in the alternative, merely descriptive and no actual confusion exists between marks because of this generic nature. Furthermore, "descriptive, or disclaimed matter typically is less significant or less dominant when comparing marks." See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846, quoting *National Data*, 224 USPQ at 752 ("Regarding descriptive terms, this Court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.")

Furthermore, under the 'anti-dissection rule' "potentially conflicting marks must be compared as a whole or as they are viewed in the marketplace, rather than broken down in the component parts. *Shen Mfg. Co. v. The Ritz Hotel*, 393 F.3d 1238 (Fed. Cir. 2004). When comparing the marks as a whole, and evaluating both dominate and subordinate features of two marks, it is clear that an average consumer would not be confused as to the sources of the goods.

We next analyze *du Pont*'s "nature of similar marks in use on similar goods" factor. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) In this case, the Opposer argues their "Gator Lager Design (which prominently features the term GATOR) would cause a person familiar with Opposer's goods to believe the goods were marketed under Abita Gator Marks." The Applicant alleges that the United States Patent and Trademark Office has permitted registration of a host of similar products in the same class and of the same kind using the term "GATOR" in either the word mark or descriptive mark for use on products sold in commerce. Specifically, in Registration No.'s 86/04297, 85/901442, 85/572070, 79/019384, 75/504083 and 75/613966 all incorporating the term "GATOR," or prominently featuring an alligator/crocodile within their respective mark drawings. Therefore, the cited reference indicates that this is a crowded field such that any one trademark has a narrow scope of protection and any minor differences in appearance are sufficient to avoid confusion in the minds of consumers.

WHEREFORE, PREMISES CONSIDERED, the Applicant prays that upon due proceedings are had, that Applicant's application Serial No. 86/416,478 be approved, that the registration of the term "GATOR" sought therein be approved, and that this opposition

proceeding be denied in its entirety, and for such other and further relief, at law and equity, to which he is entitled.

Respectfully submitted,

/s/ Bryan J. Rush
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing Answer to Opposition has been served on Opposer by mailing said copy on June 29, 2015 via first-class mail to the Opposer's attorneys of record as listed in the Trademark Status and Document Retrieval (TSDR) system located at http://tsdr.uspto.gov:

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